

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

JEREMY CONN,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 252591

Wayne Circuit Court

LC No. 03-004736-01

Before: Gage, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

Defendant appeals of right his jury trial convictions for possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

The police executed a search warrant for a home in Detroit on April 7, 2003. Defendant was sitting in the living room, where the police found marijuana, two handguns, one rifle, a bulletproof vest, and a small scale. The police also seized other quantities of marijuana and two additional rifles from other rooms of the house.

Defendant argues that the trial court abused its discretion in denying his motion for a mistrial based on juror misconduct. We review a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Lett*, 466 Mich 206, 218; 644 NW2d 743 (2002). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Patmore*, 264 Mich App 139, __; 693 NW2d 385, 390 (2004).

The fact that the jury violated the instruction against discussing the case before the close of proofs is not in and of itself a ground for a new trial. *People v Harris*, 190 Mich App 652, 662; 476 NW2d 767 (1991); *People v Rohrer*, 174 Mich App 732, 739-740; 436 NW2d 743 (1989). Before we will order a new trial on the ground of juror misconduct, "some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before a fair and impartial jury." *People v Fox*, 232 Mich App 541, 557; 591 NW2d 384 (1998). Even if the misconduct is "such as to merit rebuke from the trial court if brought to its notice[.]" we will only order a new trial if substantial harm was done. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998). Prejudice must be shown, or facts clearly establishing the inference that it occurred from what was said or done. *Id.*

After the trial court excused the alternate jurors, but before the jury began deliberations, an alternate juror wrote a note to the court, stating that the jury had been deliberating the entire time and convicted defendant based on his looks. The trial court immediately questioned the alternate juror, who said that some of the other jurors thought defendant had been “phony crying,” that defendant’s tattoo indicated gang membership, and that defendant’s brother must have been in prison because he was not at trial. Although the comments may have merited rebuke from the trial court, defendant has failed to set forth any facts that clearly establish the inference that he was actually prejudiced. The comments did not directly address defendant’s guilt or innocence; rather, they dealt with issues peripheral to whether defendant possessed marijuana and guns.

The alternate juror testified that another juror had used information from the Discovery Channel and estimated the value of the drugs and guns before such evidence was presented at trial. Defendant contends that the trial court abused its discretion in refusing to declare a mistrial due to juror misconduct on that basis. During deliberations, jurors may consider only the evidence presented in open court. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). To establish that the extrinsic influence requires reversal, defendant must prove that the jury was exposed to an extraneous influence that created a “real and substantial possibility” that it could have affected the jury’s verdict. *Id.* at 88-89. To do so, defendant must show that the extraneous influence is “substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict.” *Id.* at 89.

The jury received their instructions before the lunch break on Friday, and the trial court instructed them to select a foreperson and begin deliberations shortly before 3:00 p.m. The trial court then excused them for the weekend shortly before 4:00 p.m. When the jury returned on Tuesday morning, the trial court instructed them that they were to base their verdict “only on the evidence that has been offered and received in the course of this trial” and that information or impressions received outside the courtroom were not to play any role in their decision-making process. Considering the alternate juror’s testimony and the court’s instructions, defendant has not shown that an unprejudiced person, considering the facts on which the trial court acted, would find no justification or excuse for the ruling made. *Patmore, supra* at 390.

Although defendant correctly characterizes the information as an extrinsic influence, defendant has not shown that this extraneous influence was substantially related to a material aspect of the case, or that any connection existed between the extrinsic evidence and the verdict. At most, the street value of the drugs provided some indication of the quantity of marijuana seized, from which the intent to deliver may be inferred. *Fetterley, supra* at 517-518. The parties stipulated that the amount of marijuana seized was approximately 250 grams, and the jury was also told that small plastic bags and a scale were seized. Thus, there was no need for the jury to make any inferences from the value of the drugs, regardless whether the information came from the evidence or from the Discovery Channel. Accordingly, it cannot be said that the extraneous influence was “substantially related to a material aspect of the case” or that there was a direct connection between the extrinsic evidence and the verdict.

Lastly, defendant argues that the trial court clearly erred by denying his motion for a mistrial because the police destroyed two guns, a scale, a bulletproof vest, and some small plastic bags before trial. We review a trial court’s factual findings for clear error and its constitutional

determinations de novo. MCR 2.613(C); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Failure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown. *Arizona v Youngblood*, 488 US 51, 57; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Absent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal. *Johnson, supra* at 365. Defendant bears the burden of showing that the evidence was exculpatory and that the police acted in bad faith. *Id.*

Defendant provides no evidence that the police acted in bad faith and fails to show that the evidence was exculpatory. No fingerprints were found on the destroyed items. If anything, the lack of physical evidence at trial combined with testimony that the missing evidence tested negative for fingerprints strengthened defendant's argument that he never possessed the weapons or marijuana. Defendant has therefore failed to articulate how he was deprived his right to due process, and we conclude that the trial court did not clearly err by refusing to grant defendant a new trial.

Affirmed.

/s/ Hilda R. Gage
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin